IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 05-cv-329-GKF(PJC)**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S RESPONSE IN OPPOSITION TO "DEFENDANT TYSON FOODS, INC.'S MOTION FOR PROTECTIVE ORDER WITH RESPECT TO STATE OF OKLAHOMA'S NOTICE OF DEPOSITION OF JOHN TYSON"

COMES NOW, the Plaintiff, the State of Oklahoma ("the State"), and respectfully responds in opposition to "Defendant Tyson Foods, Inc.'s Motion for Protective Order with Respect to State of Oklahoma's Notice of Deposition of John Tyson" (Dkt. #1975) ("Motion for Protective Order"). The Motion for Protective Order should be denied for the reasons stated below.

Introduction and Background

In its Motion for Protective Order, Defendant Tyson Foods, Inc. ("Tyson") argues that the State should not be permitted to depose John Tyson ("Mr. Tyson"). Tyson bases this argument on the assertion that Mr. Tyson is an "apex employee" who has "no unique personal knowledge beyond the testimony of the company representative" that the State has already deposed (Dkt. #1975 at 3). Tyson further specifically claims that in response to the State's "wide ranging 30(b)(6) notices relating to company policies," Tyson "made available its most knowledgeable company representatives on each of the issues" that the State identified. *Id.* at 2-

3. Were this in fact true, the State would agree that there would likely be no need to depose Mr. Tyson. However, the actual deposition record belies Tyson's assertions.

Repeatedly during his deposition, when asked pertinent questions, Tyson's relevant 30(b)(6) witness, Steven Patrick, was either ill-prepared or generally unknowledgeable on pertinent topics. Following are some specific examples:

► Q. Do you personally know when the company first became aware of the environmental impacts resulting from poultry farming?

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A. No.

Q. Did you ask anybody in the company who had been there longer than you about when the company first had knowledge of the potential environmental impact from poultry farming?

A. I have not specifically went [sic] and asked about if and when poultry litter was impacting -- having a negative environmental impact, no.

Q. You didn't talk to anybody at all in the company about that?

A. …[N]o, I haven't went [sic] out to say when did we become aware of an issue…

(S. Patrick Depo., pp. 102:23 - 103:16) (Ex. A).

► Q. Have you ever seen Exhibit 25 [the "Poultry Water Quality Handbook"] before?

A. I don't recall seeing this document.

***

Q. Do you know if Tyson made this handbook available to its growers?

A. No, I do not know that.

***

Q. Have you had a discussion with anybody in the company regarding the poultry water quality handbook?

A. No.

(*Id.* at 153:2-3; 154:9-21).

► Q. …Governor Clinton had a task force back in the early 1990's regarding poultry waste management and environmental concerns…in connection with it. Did Tyson participate in the Governor Clinton task force meetings?

A. I am not aware about that meeting that would have happened and those conference calls that would have happened, if Tyson would have participated.

(*Id.* at 94:6-19).

Of course, part of the problem with Mr. Patrick is that he has only been employed with Tyson since 2003. S. Patrick Depo., p. 6:24-5 (Ex. A). Whether by design or not, Tyson designated a 30(b)(6) witness with very limited historical knowledge. And Tyson obviously did very little, if anything, to educate Mr. Patrick as to the company's historic knowledge.

The State believes it is entitled to full discovery of Tyson's corporate knowledge of the potential environmental impacts from poultry waste and how that knowledge has, or has not, shaped Tyson's policies and practices. For example, the State has learned from other sources that Tyson was involved in some capacity with former Governor Bill Clinton's Task Force on Animal Waste in the early 1990's. That Task Force helped shape Arkansas' environmental regulatory practice as it pertains to the poultry industry. Mr. Tyson was a high-ranking executive with Tyson during this time period. Further, Mr. Tyson is known to have had dealings with Mr. Clinton. By 1998, Mr. Tyson was chairman of the board. Mr. Tyson was named CEO in 2000. As CEO, Mr. Tyson would have shaped and implemented Tyson's policies, including environmental policies. He has a history with the company during pertinent timeframes at a high level, giving him unique knowledge about the evolution of Tyson's policies and practices.[1]

[1] This is evident from the fact that Mr. Tyson is the sole signatory to Tyson's "Environmental Policy." *See* Tyson Foods, Inc. Environmental Policy (Ex. B).

Contrary to Tyson's assertions, the State does not seek to depose Mr. Tyson for the purposes of harassment or embarrassment. Instead, the State believes that Mr. Tyson has unique knowledge of pertinent historical events from a vantage point that is not possessed by other witnesses. The State is entitled to this discovery and Tyson has not demonstrated otherwise. The Motion for Protective Order should be denied.

Argument

PROPOSITION: TYSON IS NOT ENTITLED TO A PROTECTIVE ORDER.

Rule 26(c) of the Federal Rules of Civil Procedure states in pertinent part:

> (1) *In General*. A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending . . . . The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense…

Fed.R.Civ.P. 26(c). As the moving party, Tyson has the burden of showing good cause for entry of a protective order. *AG Equipment Company v. AIG Life Insurance Company,* 2008 WL 3992789, at *1 (N.D. Okla. Aug. 25, 2008) (citing *Herff Jones, Inc. v. Oklahoma Graduate Services, Inc.,* 2007 WL 2344705, at *2 (W.D.Okla. Aug. 15, 2007)). "Within the context of Rule 26(c), 'good cause' contemplates a 'particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements.'" *Id.* (quoting *Herff Jones* at *2). Put another way, Tyson has the burden of establishing "'some plainly adequate reason' for a protective order." *Estes v. Conoco Phillips Company,* 2008 WL 1994918, at *2 (N.D.Okla. May 5, 2008) (citation omitted). Tyson has failed to make this showing.

"Federal courts have permitted the depositions of high level executives when conduct and knowledge at the highest levels of the defendant are relevant in the case." *In re Bridgestone/Firestone, Inc. Tires Products Liability Litigation,* 205 F.R.D. 535, 536 (S.D.Ind. 2002) (citing *Six West Retail Acquisition v. Sony Theatre Management,* 203 F.R.D. 98

(S.D.N.Y.2001); *Travelers Rental Co. v. Ford Motor Co.*, 116 F.R.D. 140 (D.Mass.1987)). High level corporate knowledge of environmental matters and the actions taken to address those matters are highly relevant to Tyson's potential liability, including its potential liability for punitive damages.[2] Mr. Tyson has been in a unique position to gain knowledge as to pertinent historical events and the evolution of Tyson's policies and practices in response to those events. During his time as CEO, Mr. Tyson would have been responsible for implementing Tyson policies, including environmental policies, which are clearly relevant in this case. Indeed, Mr. Tyson is the lone signatory of Tyson's "Environmental Policy." *See* Tyson Foods, Inc. Environmental Policy (Ex. B). Mr. Tyson does appear to have unique knowledge that is relevant in this case. The fact that he is an "apex" employee is not a sufficient ground to shield him from discovery.

In support of its argument that a protective order should issue, Tyson relies heavily on the Court's decision in *Evans v. Allstate Insurance Company*, 216 F.R.D. 515 (N.D.Okla. 2003). However, *Evans* is distinguishable on the facts. In *Evans*, the "apex" employees at issue "filed affidavits stating that they [had] **no personal knowledge** of the facts of [the] case." *Evans*, 216 F.R.D. at 519 (emphasis added). This is clearly not the case here as Mr. Tyson likely has a great deal of relevant personal knowledge. Furthermore, there is no indication that the defendant in *Evans* had designated an unprepared and unknowledgeable 30(b)(6) witness, as Tyson did here. In fact, the *Evans* Court indicated that the defendant there had "already provided adequate information." *Id.* Because Tyson provided inadequate information in the pertinent 30(b)(6)

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[2] In *Zuniga v. Boeing Company*, 2007 WL 1072207, at *3 (N.D.Okla. Apr. 4, 2007), the Court permitted the deposition of an "apex" employee as relevant to the plaintiff's punitive damages claim. In support of this ruling, the *Zuniga* Court noted that one of the factors for juries to consider when deciding whether to asses punitive damages is "'[t]he number and level of employees involved in causing or concealing the misconduct.'" *Id.* (quoting *Okla. Uniform Jury Instructions*-Civil, Instruction 5.9).

deposition, the deposition of Mr. Tyson will not be unreasonably duplicative. *See Kelly v. Microsoft Corporation,* 2008 WL 5000278, at *1 (W.D.Wash. Nov. 21, 2008) ("In deciding whether to allow the deposition of an 'apex' executive, a court considers the extent of the individual's knowledge and whether the testimony sought will be unreasonably duplicative.")

Tyson also claims that a protective order should issue because the State noticed the deposition of Mr. Tyson for the last day of discovery. However, this is not an adequate reason to issue a protective order. Defendants themselves have noticed approximately three times as many depositions as the State during the last month of discovery, including witnesses well known to them for years, such as J.D. Strong, Miles Tolbert and Ed Fite. The State has assessed the gaps in its discovery after taking the depositions of several Tyson employees (and former employees) -- including the 30(b)(6) depositions -- and determined that there was a need to depose Mr. Tyson. If anything, the fact that the State showed the restraint of noticing Mr. Tyson *after* deposing lower level employees should weigh against granting a protective order. *See Kelly v. Microsoft* at *2 (citing *Six West Retail Acquisition, Inc. v. Sony Theater Mgmt. Corp.,* 203 F.R.D. 98, 105 (S.D.N.Y. 2001)).[3]

WHEREFORE, premises considered, the State respectfully requests that the Court deny Tyson's Motion for Protective Order.

Respectfully submitted,

[3] Also, the State should not be faulted for not filing a motion to compel additional 30(b)(6) testimony. The failure to adequately prepare Mr. Patrick is Tyson's, not the State's. Further, this Court has previously observed that "[g]enerally, the party seeking discovery is entitled to make an initial choice of the method by which it is to be had and the court will not interfere unless sound reasons are shown.'" *Estes* at *2 (quoting 8 Wright & Miller § 2039, p. 512). The State's decision to obtain discovery by deposing Mr. Tyson should not be disturbed.

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